

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

12 UNITED STATES OF AMERICA)
13 Plaintiff,) 3:98-cr-00108-HDM
14 vs.) (CR-N-98-108-HDM(PHA))
15 MATEO HERNANDEZ-DE LUNA, Inmate)
16 Number 45710,) ORDER
16 Defendant.)

18 Defendant-prisoner Mateo Hernandez-De Luna pled guilty to a
19 one-count violation of 8 U.S.C. 1326, Unlawful Reentry of a
20 Deported Alien, on September 29, 1999. On January 24, 2000, he was
21 sentenced by this court to seventy (70) months imprisonment to run
22 consecutively to the undischarged term of imprisonment for case
23 CR96-1527 (a state court case). Upon release from imprisonment,
24 the defendant shall be on supervised release for a term of two (2)
25 years and may face deportation.

26 On March 18, 2011, the defendant petitioned this court for a
27 modification of consecutive sentence. (Docket No. 23) He moves
28 this court for an order modifying his federal sentence so that it

1 would run concurrently with his state court sentence and, upon his
2 release from state prison, that he be deported immediately. *Id.*

3 The court construes the defendant's petition as a motion for
4 modification of sentence under 18 U.S.C. § 3582(c). "The court may
5 not modify a term of imprisonment once it has been imposed except"
6 in certain circumstances. 18 U.S.C. § 3582(c). The court may modify
7 a prisoner's sentence: (1) "upon motion of the Director of the
8 Bureau of Prisons,... if it finds that...extraordinary and
9 compelling reasons warrant such a reduction; or ... the defendant
10 is at least 70 years of age, has served at least 30 years in prison
11 ... for the offense or offenses for which [he] is currently
12 imprisoned, and a determination has been made ... that [he] is not
13 a danger to ...[others and] the community," (2) "to the extent
14 otherwise expressly permitted by statute or by Rule 35 of the
15 Federal Rules of Criminal Procedure," and (3) "in the case of a
16 defendant who has been sentenced to a term of imprisonment based on
17 a sentencing range that has subsequently been lowered[,]... upon
18 motion of the defendant[,] the Director of the Bureau of Prisons,
19 or ... the court." 18 U.S.C. § 3582(c)(1)-(2).

20 The defendant has not met the criteria for a modification of
21 sentence. First, the Director of the Bureau of Prisons did not
22 petition the court to modify the defendant's sentence on the basis
23 of the defendant's age, the length of his prison term, or because
24 he no longer presents a danger to others and the community. 18
25 U.S.C. § 3582(c)(1)(A). The defendant is not "at least 70 years of
26 age." *Id.* He was 31 in 1999, and must now be in his early forties.
27 He has not "served at least 30 years in prison" for the offense at
28 issue. *Id.* He was sentenced by this court in January of 2000 to

1 under six years imprisonment to run consecutively to his state
 2 court case.¹ It has not been asserted that the defendant is no
 3 longer a threat to society. *Id.* Second, the court finds no basis
 4 to modify the defendant's imposed term of imprisonment that is
 5 "otherwise expressly permitted" by statute or Federal Rule of
 6 Criminal Procedure 35. 18 U.S.C. § 3582(c)(1)(B). Third, the
 7 defendant's term of imprisonment was not "based on a sentencing
 8 range that has subsequently been lowered." 18 U.S.C. § 3582(c)(2).

9 In addition, to the extent the defendant requests that this
 10 court expedite any removal proceedings he may be subject to upon
 11 his release from prison, this court does not have authority to
 12 grant that relief. Only the Attorney General of the United States
 13 has the authority to remove an alien. 8 U.S.C. § 1231(a)(4)(A) (the
 14 Attorney General may not remove an alien who is sentenced to
 15 imprisonment until the alien is released from imprisonment); 8
 16 U.S.C. § 1231(a)(4)(B) (the Attorney General is authorized to remove
 17 an alien, if the Attorney General determines that the alien is
 18 confined pursuant to a conviction for a nonviolent offense, or the
 19 alien's removal is appropriate and in the best interest of the
 20 United States); *Tamayo v. Holder*, 2009 WL 2488032 (C.D.Cal.
 21 2009) (court lacked authority to initiate deportation order); *United*
 22 *States v. Tinoso*, 327 F.3d 864, 866 (9th Cir. 2003) (determination
 23 of whether an alien is subject to deportation resides in the
 24 Executive Branch). Furthermore, "a district court cannot *sua*
 25 *sponte* issue a deportation order without a request from the United
 26 States Attorney." *United States v. Marin-Castaneda*, 134 F.3d 551,
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28 ¹ The state court case originated in 1996.

1 556 (3d Cir. 1998) (district court lacked authority to depart
2 downward in sentence because of Attorney General's statutory power
3 to deport alien before completion of prison term). Lastly,
4 imprisoned aliens or those on supervised release have no private
5 right to speedy removal. 8 U.S.C. § 1231(a)(4)(D) (aliens
6 "imprisoned, arrested, or on parole, supervised release, or
7 probation" cannot assert a cause or claim "under this paragraph
8 against any official of the United States or of any State to compel
9 the release, removal, or consideration for release or removal of
10 any alien"); *United States v. Aispuro*, 127 F.3d 1133, 1134 (9th
11 Cir. 1997) (an alien has no private right of action to compel the
12 Attorney General to remove him from the United States prior to the
13 completion of his sentence); *Tamayo*, 2009 WL 2488032 (no private
14 right of action to compel deportation). Thus, this court does not
15 have the authority to expedite or compel the defendant's removal
16 proceedings.

17 Accordingly, the defendant's motion for modification of
18 consecutive sentence (#23) is DENIED.

19 It is so ORDERED.

20 DATED: This 6th day of April, 2011.

21 
22 UNITED STATES DISTRICT JUDGE
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